

C O P Y

NEW HAMPSHIRE LAW LIBRARY

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January 7

CONCORD, N.H.

Admiral Andrew G. Bisset
State Director of Civil Defense
Concord, New Hampshire

Dear Admiral Bisset:

In a letter of December 4 and in a subsequent conference, you have raised certain questions concerning the possible liability of the owner or occupier of a building who permits the use of his premises as a shelter.

As I understand the case, the agreement between the owner or occupier and the local civil defense organization is purely gratuitous; the owner or occupier merely consents that the general public may enter his building for the purpose of physical protection during civil defense emergencies, real or simulated.

Throughout the following statement I shall use the word "possessor" to indicate the person who is actually in control of the area in question; such person is the one upon whom liability would lie. Generally, the term will refer to the owner or, if the property is leased, to the person holding the lease and occupying the building under it.

Under these circumstances, the possessor is, in the law, deemed a gratuitous licensor; persons entering under the agreement would do so in the right of the civil defense organization and would be in the status of gratuitous licensees. The liability of a possessor in respect to a gratuitous licensee is well settled. In a recent case, our Supreme Court has said that a possessor of real estate owes to a bare (or gratuitous) licensee only the duty to exercise reasonable care to disclose to him dangerous defects in the premises which are known to him and are likely to be undiscovered by the licensee. Mitchell v. Legarsky, 95 N.H. 214. Restated, the law sets forth the following under the gratuitous licensor - gratuitous licensee relationship:

- (a) There must be a defect in the premises which the reasonable person would recognize as capable of causing injury;
- (b) the possessor must himself actually be aware of the existence of the defect; and
- (c) the defect must be hidden, that is, of such a nature that a reasonable person, entering on the premises

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for shelter and having due regard for his own safety, would not be likely to discover it in time to avoid injury to himself.

Then, if all these conditions be met, the owner or occupier is under an obligation to take reasonable steps to notify the licensee of the existence of the defect. This is not an absolute, unqualified responsibility on the part of the possessor; it only requires him to take such action by means of notification -- as, for example, by warning signs -- that the person entering is put on notice that there is a dangerous condition on the premises.

Under the law as set forth above, the obligations of the possessor would seem such as are easily met, since possessors -- knowing of dangerous defects -- would of course wish to take steps to notify persons coming on their premises, and this, in essence, is all that is required to save the possessor harmless.

However, it would seem that a ^{somewhat greater} slight measure of protection could be given the possessor if he should desire to be enrolled as a civil defense agent or representative. Under the provisions of Laws of 1949, c. 304, s. 9, civil defense representatives and employees, while acting under the civil defense organization, are relieved of liability for personal injury or death caused in a civil defense activity so long as the agent, employee or representative is acting in good faith and not wilfully or wantonly. You may wish then, to consider the creation of a special category of civil defense agents or representatives to consist of building possessors with the assignment of maintaining their buildings as civil defense shelters.

I might point out, however, that this would not greatly increase the protection of the possessor over what he has as a merely gratuitous licensor. Under the statute cited he is protected only if he is not acting wilfully or wantonly. And if he, as a civil defense agent and representative, knowing of a hidden defect almost in the nature of a trap, took no steps to advise persons seeking shelter of it, he could well be deemed to be acting in a wanton manner. However, for whatever protection it would afford, the status of a civil defense agent or representative is recommended for those owners or occupiers who may wish to take advantage of it.

You point out, as a further matter for consideration, that while certain portions of a building are perfectly safe for public occupancy in civil defense activities, yet other portions may be inherently dangerous, and you ask what steps the possessor may take to confine the public to the safe portion, the portion which the possessor and the civil defense organization desire to be used for shelter purposes. It would seem very clear that signs marking the limits of the shelter area would provide adequate protection to the possessor. An individual passing beyond the designated area as indicated by the signs would be a trespasser and as such he would act very nearly at his own peril. Physical barriers would not be required; legible signs, so placed that any person having reasonable concern for his own safety ought to see them, would be sufficient.

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I trust that the foregoing will be of assistance to you.
If further explanation is required, you may be sure of our desire to cooperate
to the extent of our ability.

Very truly yours,

Warren E. Waters
Assistant Attorney General

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